to assert that real property owners have necessarily ceded their rights to exclude any and all telecommunications carriers once they have agreed to allow access to one such provider. Moreover, the industry also has well-established rights to receive substantial telecommunications revenue, with an industry average for this revenue of approximately 12¢/square foot of real estate. *See* 1999 BOMA EXPERIENCE EXCHANGE REPORT, at 16 (BOMA International, 1999). The market for PCS antennas contributes a significant amount to real estate owners, with an estimated average price for an antenna site of $1,500 per month. Given the well-established nature of the telecommunications revenue received by real estate owners, the proposals must be read as seriously interfering with the reasonable investment backed expectations of these owners that they will be able to continue to generate these revenues in the future.

The Supreme Court has unequivocally held that "investment-backed expectations" are the essence of the private property rights protected by the Takings Clause of the Fifth Amendment of the Constitution, *see, e.g., Penn Central,* 438 at 124, and that the interference with such expectations will itself dispose of the regulatory takings analysis, *see, e.g., Monsanto,* 467 U.S. at 1005. Thus, the real estate industry's potential to earn returns on its assets related to the provision of telecommunications services provides the basis for finding that regulations which totally eviscerate and frustrate that potential constitute a regulatory taking.

The Commission's proposals also have a severe economic impact on building owners. On a going forward basis, the ability to sell access, as well as to directly or indirectly provide telecommunications services, to 28% of all housing units nationwide, in addition to the businesses occupying the approximately 10 billion square feet currently under commercial lease in the United States (?), will certainly command enormous value. At a modest $0.40 per square foot per year, this value is substantially in excess of $10 billion per year. (?) Finally, the nature of the government action taken by the Commission with respect to building owners is essentially to override the owners' core property rights in favor of a policy designed to benefit another industry. This type of action is at the core of what the Takings Clause is designed to protect against.

(D) The Fifth Amendment Requires Payment Of Fair Market Value For The Taking Of Property

Whether described as a *per se* taking or as a regulatory taking, the effect of the NPRM will be to trigger the Fifth Amendment rights of every multi-tenant building owner throughout the country. Each of these owners will have a constitutional right to the payment of just compensation, a right that will presumably be asserted through litigation in the Court of Federal Claims under the Tucker Act. The standard for determining what constitutes just compensation is the fair market value of the property as of the time that it was taken. *See, e.g., United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950).

While a detailed factual discussion of the valuation methods and results relevant to a determination of fair market value are beyond the scope of these comments, the scope of the impact of the proposed rules, together with the changing nature of the real estate industry, make very plain the fact that the dollar amount of the collective damages that will be payable to multiple-tenant building owners will be staggering. Indeed, the foregoing discussion on regulatory takings establishes not only the likelihood of liability under the Takings Clause, but also the massive extent of the damages that would ensue. Property owners who currently are engaged in joint venture agreements with telecommunications companies, who are negotiating access agreements, who are developing direct service subsidiaries, or who are investing in upgraded networks all will have powerful and substantial claims that the proposed rules effected a taking under *Loretto*, and that the fair market value of what was taken must reflect their current business plans and investment strategies.

The aggregate of all the property rights taken would likely exceed the largest single body of damage claims ever asserted against the United States Government under takings theories. The takings claims of owners of 10 billion square feet of commercial leaseholds and of the 28% of housing units located in multi-tenant environments would give rise to claims that credibly would run into the tens of billions of dollars.

III. CONGRESS DID NOT PROVIDE STATUTORY AUTHORITY TO THE COMMISSION TO EXERCISE THE POWER OF EMINENT DOMAIN

Given that the proposals contained in the NPRM will effect a widespread and extremely costly taking of the private property of building owners within the meaning of the Fifth Amendment, the relevant inquiry is whether the Telecommunications Act of 1996 ("Telecommunications Act") granted the Commission the power of eminent domain with respect to these building owners. It is certainly not clear from the plain language of the statute that the Commission was granted this authority. Moreover, it is well established that a statute should be interpreted so as to avoid a meaning that might either raise a question as to its constitutionality or implicate special constitutional concerns. Finally, Congress cannot delegate the power of eminent domain without doing so in clear and express terms because the exercise of this power encroaches on the otherwise exclusive power of Congress over appropriations, and because the Appropriations Act prohibits implied appropriations.

(A) No Provision In The 1996 Telecommunications Act Provides The Commission With Authority To Take The Private Property Of Building Owners

There is no provision in the Telecommunications Act that expressly provides the Commission with the power of eminent domain over the property of building owners. In proposing its general nondiscrimination requirement in the NPRM, the Commission relies upon its general jurisdiction to enforce the

Telecommunications Act with respect to "all interstate and foreign communication by wire or radio," and then points out that the definition of both "wire communication" and "radio communication" include "all instrumentalities, facilities, apparatus, and services . . . incidental to" such communication. *See* NPRM, ¶ 56. This statute hardly supports the Commission's claimed authority to take private property and to provide just compensation for that property in accordance with the Takings Clause.

Likewise, the statutory authorities relied upon in the NPRM for the extension of section 224 and of the *OTARD Ruling* both involve rules broadly authorizing the Commission to enforce certain access rights, but by no means contemplating that the Commission would or could infringe upon the established property rights of building owners in fulfilling its enforcement duty. *See generally* NPRM, ¶¶ 36, 69. For example, neither of these rules contain any language that refers to the need to pay just compensation to building owners.

Accordingly, the Telecommunications Act provides no explicit authority allowing the Commission to promulgate rules that will effect a taking of the private property of building owners, so that if the power of eminent domain is somehow granted by that legislation, it must be implicit rather than explicit.

(B) It Is Well Established That, In The Absence Of Express Statutory Language, Courts Will Avoid Interpreting Legislation In A Manner That Either Raises A Serious Question As To Its Constitutionality Or Otherwise Implicates Constitutional Concerns

The Supreme Court has repeatedly stated that it construes statutes to defeat administrative orders that raise substantial constitutional considerations. *See Rust v. Sullivan*, 500 U.S. 173 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988). This doctrine of invalidating constitutionally questionable regulations and orders reflects the broader doctrine of interpreting statutes generally so as to avoid raising serious constitutional questions. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991).

This principle must be followed in cases that raise a question whether an administrative order might constitute a taking of private property under the Fifth Amendment, notwithstanding the fact that a taking is not strictly speaking unconstitutional unless it goes uncompensated. *See United States v. Security Industrial Bank*, 459 U.S. 70 (1982). Thus, whenever "there is an identifiable class of cases in which application of a [rule] will necessarily constitute a taking," the Supreme Court has stated that it will adopt a narrowing construction of the rule so as to avoid this outcome. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5. Indeed, based in part on this doctrine of construing statutes so as to avoid constitutional questions, the D.C. Circuit decided in 1994 that the Commission did not have authority to order physical collocation of competitive

access providers ("CAPs") to the central offices of local exchange companies ("LECs"). *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

In *Bell Atlantic*, while the Commission concededly did have statutory authority to order "physical connections," this authority could be satisfied by a form of collocation known as "virtual" collocation, where the CAP simply strings its own cable to a point of interconnection near to the LEC central office, and did not necessarily require physical collocation. As a result, the court ruled that the Commission did not have authority to order physical collocation, since this form of collocation "would seem necessarily to 'take' property regardless of the public interests served in a particular case." *Id.* at 1445 (citing *Loretto*). Indeed, the court stated that it would uphold the Commission's authority only if "any fair reading of the statute would discern the requisite authority," or if the Commission's authority would "as a matter of necessity" be defeated absent such authority. *Id.* at 1445-46 (emphasis added).

In addition to *Bell Atlantic*, a number of other cases, discussed or referenced above, have narrowly construed the Cable Act in order to avoid possible Takings Clause problems. Indeed, these cases primarily involved the question as to the scope of forced access requirements, and whether they could be read to extend to rights of way that had previously been granted to specific carriers, or applied only to clearly dedicated "easements." Courts have construed the statutes narrowly so as to avoid the question whether the broader

construction urged by the plaintiffs would constitute a taking. *See, e.g. Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993) (rejecting the plaintiffs broad interpretation of "dedicated" easement as raising "serious questions" under the Takings clause); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993) (adopting result of *Cable Holdings*); *Cable Investment Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989) (construing section 621(a)(2) narrowly to avoid constitutional concerns about a potential taking without just compensation).

Because the Telecommunications Act, which was enacted two years after the D.C. Circuit's decision in *Bell Atlantic*, in no way speaks to the question of how to exercise the power of eminent domain or of how to compensate building owners, it is clear that the Commission lacks statutory authority to issue these regulations.

(C) Because It Violates Appropriations Law, An Unauthorized Taking Is Especially Problematic, And Courts Therefore Require A Higher Standard To Be Satisfied In Determining Whether Authority Exists

The Appropriations Clause, U.S. Const., Art. I, § 9, cl. 7, provides: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The Supreme Court has relied on this clause in ruling that no funds shall be transferred from the Treasury other than in accordance with the

letter of the difficult judgments made by Congress. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 428 (1990). Thus, the Court has held that plaintiffs will established legal remedies against the Government nevertheless cannot recover monetary damages, absent a clear congressional appropriation. *Id. at* 425 (holding that equitable doctrine of estoppel could not grant respondent a remedy that Congress has not expressly authorized); *Knote v. United States*, 95 U.S. 149, 154 (1877) (the pardon power of the President, however large, "cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress); *cf. Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80 (1992) (reasoning that funds held in the Treasury during the course of an ongoing *in rem* forfeiture proceeding cannot properly be considered public funds).

For an agency to order the taking of private property, it necessarily must have authority from Congress to spend the public funds needed to pay just compensation to the owners of that private property. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 631-32 (1952) (Douglas, J., concurring) (reasoning that the necessary result of Fifth Amendment and the constitutional separation of powers is that Congress is the only branch of government able to raise revenue and is therefore the only branch able to authorize a seizure of property under the Takings Clause). Moreover, this basic constitutional principle was recognized by the D.C. Circuit in *Bell Atlantic* in 1994, as evidenced in its explanation of why the

deference to administrative action articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), do not apply where the action will effect a taking:

> *Chevron* deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen.

Bell Atlantic, 24 F.3d at 1445; *see also GTE Northwest v. Public Utility Commission*, 900 P.2d 495 (Or. 1995) (ruling that "the power of eminent domain may be exercised by an agency only if the agency has express statutory authority.").

Thus, because Congress is the only branch of government constitutionally entitled to raise and spend revenue, the Executive's power to create financial liabilities for the government requires an express statutory authorization. There is no provision in the Telecommunications Act that can plausibly be read to provide the Commission with this authority. Indeed, in light of the enormous financial liabilities that would be triggered by the regulations proposed in the NPRM, *see* Section II(C) above, it is inconceivable that Congress would have authorized this expenditure, let alone have done so implicitly and without any debate in the legislative history of the Telecommunications Act. *See* S. Conf. Rept. 104-230.

For the Commission to exercise the power of eminent domain contained in the NPRM would therefore constitute an unauthorized encroachment on

Congress' exclusive power under the Appropriations Clause, and, in addition, may well cause a violation of the Anti-deficiency Act. This statute prohibits agency's from spending or obligating funds in excess of their annual appropriation, and the Supreme Court has recently indicated that if an agency were to expose itself to massive financial liability through lawsuits, it would then be in jeopardy of violating this statute. *See Hercules v. United States*, 516 U.S. 417 (1996).

For the foregoing reasons, it is clear that the Telecommunications Act did not provide the Commission to promulgate those regulations proposed in the NPRM that would constitute a taking of the private property of building owners.

IV. CONCLUSION

As a general matter under local law, building owners are free to restrict access to their property to specific utilities and telecommunications providers, and to negotiate leases with tenants that restrict the tenants' ability to place telecommunications equipment on the building. If the Commission promulgates a rule that prohibits or abrogates these underlying rights of building owners, then it has effected a taking of their property. Under established Supreme Court precedent, this taking is best analyzed as a *per se* taking by virtue of the fact that it causes a permanent physical occupation of the property. In addition, because the prohibitions essentially disable building owners from being able to generate

any telecommunications-related revenue from their otherwise uniquely valuable telecommunications assets, the prohibitions also amount to a regulatory taking.

Whether viewed as a *Loretto* taking or a regulatory taking, however, the regulations proposed by the Commission in the NPRM would trigger a very large financial liability for the Government to pay just compensation to building owners. This liability was certainly not foreseen or intended by Congress when it passed the Communications Act, nor was there any indication at all in the act that Congress meant for the Commission to have the authority to issue regulations restricting the established rights of real property owners.

For these reasons, the Commission should revise its proposed regulations so as not to impinge on the property rights of building owners.

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